IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.1353 OF 2007.

Sau. Sarlabai Padamchand Oswal,
aged : Major, Occu.: Business,
R/o. Khamgaon, Tq. Khamgaon,
Distt. Buldhana.

.. **PETITIONER**.

// VERSUS //

1. M/s. Somanwaya Grah Nirman Sanstha,
   Khamgaon, through its Partners R 2 to 7
   Tq. Khamgaon, Distt. Buldana.
   and six others.

.... **RESPONDENTS**.

Shri A.S.Kilor, Advocate for Petitioner.
Shri S.V.Sirpurkar, Advocate for Respondents No.2 to 5.

CORAM: R.C. CHAVAN, J.

DATED : MAY 04, 2007.

ORAL ORDER :

1. Petitioner, plaintiff in Regular Civil Suit No. 7 of 2007 before the

learned IInd Joint Civil Judge Jr.Dn., Khamgaon, has filed this petition to have order passed by the learned Judge below Exh.11 in the said suit quashed and set aside.

2. I have heard Shri A.S. Kilor, learned counsel for the petitioner and Shri Sirpurkar, learned counsel for respondents No.2 to 5.

3. The petitioner had filed the said suit for declaration that Respondent No.2 Tejraj Uderaj Oswal was not entitled to hold any meeting for expelling the plaintiff or any other partner from partnership, and that notice dated 16.01.2007 issued by said Tejraj was unauthorised and illegal. She also sought injunction to restrain Tejraj from holding meeting or expelling the plaintiff.

4. Tejraj filed application at Exh.11 with a prayer that since the partnership deed contained arbitration clause and since a dispute has been raised by the plaintiff it would have to be referred to arbitrator for arbitration and proceedings in the suit would have to be stayed. The plaintiff filed elaborate reply to this application contending that there is no arbitration clause in the partnership deed which is in force i.e. deed dated 01.04.1997. She stated that the old partnership deed dated 26.01.1979 was filed by her

only to show that the earlier agreement dated 26.01.1979 was substituted by new agreement.

5. After hearing the parties, the learned Judge, by his impugned order dated 6th February, 2007, held as under :

> "*1. The parties are called upon to determine at their freewill and to furnish their, joint or respective statements in respect of the names and number persons sought to be appointed as Arbitrators along with their willingness to act and their estimated fees.*
>
> *2. The parties are further called upon to determine at their will, the procedure for appointment stipulates Under Section 11(2), Procedure to be followed by Arbitrator as provided in the Section 19(2), Place of Arbitration as per Section 20(1), and the Language to be followed in Arbitration proceeding as per Section 22(1).*
>
> *3. The parties are requested to furnish the above compliance within 15 (Fifteen) days, without fail."*

Aggrieved thereby the petitioner has filed present petition.

6. The learned counsel for the petitioner painstakingly submitted that since there was no arbitration clause in the agreement, subsisting between parties, the learned trial judge has wrongly concluded that such a clause existed. He submitted that the initial partnership deed dated 26th January, 1979, which contained the following arbitration clause, ceases to

bind the parties. The arbitration clause reads as under :

> "*12. Any controversy or claim relating to this partnership or any breach in respect thereof shall be a subject to arbitration under the Arbitration Act, then in force. The decision arrived at by the arbitrator shall be binding on all the partners.*"

7. He submitted that since the partnership was at will and since the partnership deed dated 26th January, 1979 was executed between the original partners some of whom do not now continue, the deed is no longer a contract binding the parties. According to the learned counsel the contract has been substituted by a new contract and therefore, the obligations in the original contract dated 26th January, 1979 need not be performed in view of provisions of Section 62 of the Contract Act. For this purpose he relied on a number of decisions. In *Union of India vs. Kishorilal*, reported at **AIR 1959 SC 1362**. Original contract between the parties contained an arbitration clause. The disputes under the contract were amicably settled and separate documents were executed to evidence such settlement. The settlement recorded either on payment of amount mentioned in the statement or in one case even without such payment, that the "contract was finally determined". In view of this, it was submitted that the arbitration agreement ceases to exist. The Court considered the provisions of Section 62 of the Contract Act as also the concept of "accord and satisfaction". Majority of the

Court found that the terms of arbitration clause in the original contract were wide and comprehensive. Yet, it held in paragraph 8 of the judgment as under:

> "*..... Though the phraseology was of the widest amplitude, it is inconceivable that the parties intended its survival even after the contract was mutually rescinded and substituted by a new agreement. The fact that the new contract not only did not provide for the survival of the arbitration clause but also the circumstance that it contained both substantive and procedural terms indicates that the parties gave up the terms of the old contracts, including the arbitration clause.....*"

8. In paragraph 10 of the judgment, majority of the Court then summed up principles emerging from analysis of law undertaken by the Supreme Court. Paragraph 10 reads as under :

> "*(10) The following principles relevant to the present case emerge from the aforesaid discussion : (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation, it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for, along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the*

arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

9. In *Raja Shiba Prasad Singh Vs. Tincouri Banerji & another*, reported at **A.I.R. 1939 Patna 477**, on which the learned counsel for the petitioner placed reliance, Patna High Court had observed that in a suit based on novated contract the plaintiff must prove the existence of liability under the original contract and extinguishment of that liability by the novated contract. Judgments in *Hukumatmal vs. Jethanand*, reported at **A.I.R. (31) 1944 Sind 205** and *Babulal Marwari Vs. Tulsi Singh*, reported at **A.I.R. 1940 Patna 121** take a similar view.

10. In *Lloyds Steel Industries Limited Vs. Oil & Natural Gas Corpn.Ltd.*, reported at **AIR 1997 Bombay 337** on which the learned counsel placed reliance, this Court had held that question which would be required to be decided is whether the agreement referring disputes to arbitrator is in existence or not. The decision in *R.N. Kumar Vs. R.K. Soral*, reported at **AIR**

1988 SC 1205 on which the learned counsel for the petitioner placed reliance is unhelpful to support the petitioner's contention.

11. It is clear from the judgments, on which the learned counsel for the petitioner placed reliance, that if a contract is substituted by parties by a new contract then the obligation in the contract so substituted, would not have to be fulfilled. In all these cases, the question would be whether the parties intended to substitute the earlier contract by new one and this question would be one of fact. The learned counsel for the petitioner submitted that partnership deed dated 26th January, 1979, Annexure-V and the partnership deed dated 1st April, 1997, Anneuxre-VI, would clearly show that the deed dated 26th January, 1979 has been substituted by the deed dated 1st April, 1997.

12. He pointed out that not only had the partners changed but almost all the terms of partnership have changed. He, therefore, submitted that the learned trial Judge was in error in holding that the partnership deed dated 1st April, 1997 was a supplement to the deed dated 26th January, 1979. His learned adversary Shri S.V. Sirpurkar submitted that only those clauses which parties desired to alter were incorporated in the deed dated 1st April, 1997 and therefore, the deed was titled as “Partnership Deed

(supplementary)". Advocate Sirpurkar, learned counsel for the respondent, pointed out that even in the plaint the petitioner had described the deed dated 1st April, 1997 as supplementary deed. He submitted that the word supplementary clearly indicated that the parties wanted to supplement the earlier deed and supplant it.

13. Advocate Kilor, learned counsel for the petitioner took a strong exception to this line pursued by his learned adversary and contended that title of the document would not be decisive of the nature of the document and therefore, mere use of word "supplementary" should not have weighed with the learned trial Judge.

14. I have carefully considered the arguments advanced. The question, whether the document dated 1st April, 1997 substitutes original contract dated 26th January, 1979 is one of fact and would have to be resolved with reference to documents themselves. It is clear that the document dated 1st April, 1997 is titled as "Partnership Deed (Supplementary)" indicating that the parties used the word "supplementary" and avoided stating that a new partnership has come into being. Apart from the fact that the petitioner/plaintiff in paragraph 1 of the plaint itself had described the document as "Supplementary Deed of Partnership", as

observed by the learned trial judge, the Deed dated 1st April, 1997 mentions that the partnership business shall be "continued" and "shall be deemed to have been continued" with are sufficient indicators of the fact that the original partnership created by the deed dated 26th January, 1979 continued.

15. The contention of the learned counsel for the petitioner that in fact, with every change in the partnership a new partnership comes into existence as technically correct. But it does not follow that the parties necessarily bring about entirely new set of obligations governing their inter-se relations. In this case, the petitioner/plaintiff was partner of the original partnership which came into existence by deed dated 26th January, 1979 and has continued as such through to several changes because of retirement/ death of partners. Therefore, unless it is shown by some positive act that the parties intended to put an end to their obligations in the earlier contract, as was the case in *Union of India Vs. Kishorilal*, it would be impermissible to hold that the obligations in the original document dated 26th January, 1979 cease to bind the parties or that by novation the original contract became redundant or incapable of being performed. Rather the use of word "Supplementary" in the title of document and reference to "Continuation" in the body of document dated 1-4-1997 contradict any inference of parties' intention to put an end to their obligations in the earlier contract.

16. In view of this, the factual conclusion drawn by the learned trial Judge does not appear to be perverse or illegal warranting any interference in exercise of jurisdiction under Article 226 or 227 of the Constitution. The conclusions drawn are perfectly in tune with the requirements of law and do not show that any substitution of contract warranting non performance of obligations under the original contract has taken place.

Consequently the petition is dismissed.

JUDGE

RR..